

1 Merrill - Highly Confidential - Trade Secret

2 A F T E R N O O N S E S S I O N

3 2:20 p.m.

4

5 THE VIDEO OPERATOR: We're back on
6 the record. The time on the screen is 2:20:30.

7 D A V I D E R N E S T M E R R I L L,
8 resumed, having been previously duly sworn, was
9 examined and testified further as follows:

10 CONTINUED EXAMINATION

02:20:32 11 BY MR. KILLORY:

02:20:36 12 Q. Mr. Merrill, we had some conversation
02:20:40 13 this morning regarding the target soluble level
02:20:46 14 for finished RL product. Is that correct?

02:20:50 15 A. Yes.

02:20:54 16 Q. And I believe your testimony was that
02:21:00 17 at the time you were at the Park 500 facility, to
02:21:06 18 the best of your recollection, the target
02:21:08 19 specification range was 46 to 48 percent by
02:21:12 20 weight soluble content in the finished sheet. Is
02:21:12 21 that correct?

02:21:14 22 A. That's correct.

02:21:18 23 Q. In your time at Park 500, do you
02:21:22 24 recall that number, that target specification
02:21:26 25 level for solubles in the finished sheet being

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02:21:28 2 changed?

02:21:30 3 A. No, I do not.

02:21:34 4 Q. Was there any seasonal or other
02:21:38 5 variation in that target level in the time you
02:21:38 6 were at Park 500?

02:21:42 7 A. Not that I'm aware of, no.

02:21:44 8 Q. Since your time at Park 500, are you
02:21:48 9 aware of any changes in the specification target
02:21:54 10 range for solubles in the finished sheet?

02:21:58 11 A. Only through discussions with the
02:21:58 12 attorneys.

02:22:02 13 Q. So excluding consultations with
02:22:04 14 counsel, you're not aware of any such changes?

02:22:04 15 A. That's correct.

02:22:30 16 Q. In your time at Park 500, did you
02:22:40 17 ever experience a situation where there were low
02:22:48 18 levels of solubles of DNCEL available for adding
02:22:50 19 to the finished sheet?

02:22:52 20 A. Yes.

02:22:54 21 Q. How often did that happen?

02:23:02 22 A. I don't recollect exactly how often
02:23:02 23 it happened.

02:23:04 24 Q. Do you recall the circumstances that
02:23:08 25 gave rise to that situation?

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02:23:12 2 A. No, I can't recall any specific
02:23:14 3 circumstances that led to that particular
02:23:16 4 situation.

02:23:18 5 Q. In general, do you recall any -- the
02:23:24 6 reason why you would run low on solubles?

02:23:28 7 A. When I was at Park 500, we would have
02:23:34 8 to throw some away from time to time. When you
02:23:38 9 made the base web sheet, when you pulled it off
02:23:42 10 of the Yankee dryer, you would have some fuzz on
02:23:46 11 the back, small pieces of fiber, and over a
02:23:48 12 period of time the size would collect those
02:23:52 13 fibers and get real thick to the point where it
02:23:54 14 would break the sheet. So we would have to throw
02:23:58 15 solubles with fiber away.

02:24:00 16 Q. When you would throw the solubles
02:24:04 17 away, they would at that time be with the fiber?

02:24:06 18 A. That's correct.

02:24:10 19 MR. NUNLEY: Well, I think -- are you
02:24:14 20 meaning with the fiber from the standpoint of in
02:24:16 21 the form of finished sheet? Or do you mean just
02:24:18 22 the fiber residue as it comes off the can
02:24:20 23 dryer --

02:24:20 24 MR. KILLORY: Let's ask some
02:24:24 25 clarifying questions to make sure we're clear on

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2 02:24:24 2 the record.

3 02:24:32 3 Q. You said when you made the base web
4 sheet, when you pull it off the Yankee dryer you
5 would have some fuzz on the back, small pieces of
6 fiber, and over a period of time the size would
7 collect those fibers and get real thick to the
8 point where it would break the sheet. "So we
9 would have to throw solubles with fiber away."

10 02:24:48 When you're referring to those
11 02:24:54 solubles that you're throwing away, it's solubles
12 02:24:54 that have picked up those pieces of fuzz or
13 02:24:58 pieces of sheet, and those are the fines that's in
14 02:25:00 the solubles that you're referring to when you're
15 02:25:02 talking about throwing them away with the fiber?

16 02:25:02 A. That's correct.

17 02:25:04 Q. So when these solubles were thrown
18 02:25:08 away they had not yet been reapplied or added to
19 02:25:12 any base web sheet?

20 02:25:12 A. That's correct.

21 02:25:16 Q. And as a result of throwing away
22 02:25:20 those solubles, you could run low on solubles
23 02:25:24 available for adding to the base web sheet?

24 02:25:26 A. That could be a possible reason why
25 02:25:28 we might have run low.

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02:25:30 2 Q. Were there any other reasons that you
02:25:32 3 can recall for running low?

02:25:32 4 A. No.

02:25:38 5 Q. Do you ever recall a low soluble
02:25:40 6 content of incoming materials as a reason why you
02:25:44 7 ran low on solubles available for adding to the
02:25:46 8 finished sheet?

02:25:48 9 A. No, not that I recall.

10 (Merrill Exhibit 13 for
11 identification, memorandum dated August 7th,
12 1989, from C. U. Spellmeyer to distribution.)

02:26:48 13 Q. Mr. Merrill, the court reporter is
02:26:52 14 handing you Merrill Exhibit Number 13, which is a
02:26:58 15 one-page document bearing PA 473640, the
02:27:02 16 production number 2030961246.

02:27:04 17 It's a memorandum dated August 7th,
02:27:08 18 1989, from C. U. Spellmeyer to distribution,
02:27:14 19 notice of specification change. It has a
02:27:16 20 distribution list. Your name is not included on
02:27:18 21 the distribution list. Have you had a chance to
02:27:18 22 look at the document?

02:27:22 23 A. Yes, I have.

02:27:24 24 Q. Who is Mr. Spellmeyer?

02:27:28 25 A. Cherri Spellmeyer. I know of her is

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02:27:28 2 all I can tell you.

02:27:30 3 Q. Do you know what position she held in
02:27:30 4 1989?

02:27:32 5 A. No, I do not.

02:27:36 6 Q. Do you ever recall seeing this
02:27:38 7 document before?

02:27:42 8 A. No. I have never seen this document.

02:27:44 9 Q. Do you recall seeing any other
02:27:48 10 documents reflecting specification changes for
02:27:52 11 final product solubles at Park 500?

02:27:54 12 A. Not that I recall, no.

02:28:06 13 Q. Do you know what the difference is
02:28:10 14 between RLTC and RLB?

02:28:12 15 A. No, I do not.

02:28:16 16 Q. Those are not abbreviations with
02:28:18 17 which you are familiar?

02:28:20 18 A. No. I am familiar with the
02:28:22 19 abbreviations.

02:28:24 20 Q. What does RLTC stand for?

02:28:26 21 A. I don't know what RL -- I don't know
02:28:30 22 what the TC in RLTC stands for specifically.

02:28:32 23 Q. What is your understanding of what
02:28:34 24 RLTC represents?

02:28:38 25 A. My understanding of RLTC is that is

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02:28:42 2 the liquid flavor.

02:28:48 3 Q. So that's RL with a liquid flavor?

02:28:48 4 A. That's my understanding.

02:28:48 5 Q. How about RLB?

02:28:52 6 A. RLB is a similar product to what was
run when I was at Park 500.

02:28:56 7 Q. And what is that?

02:29:04 9 A. It's what the sugar and the DAP and
02:29:06 10 the preservatives, et cetera.

02:29:10 11 Q. Did it use dry flavors as contrasted
02:29:12 12 with the liquid flavors of RLTC?

02:29:16 13 A. The RL when I was there used the dry
02:29:16 14 flavors.

02:29:22 15 Q. At the time you worked at Park 500,
02:29:24 16 were there more than one RL product being
02:29:26 17 produced?

02:29:30 18 A. As I said earlier this morning, near
02:29:32 19 the end of my time, they switched to the liquid
02:29:34 20 flavors.

02:29:36 21 Q. When they switched to the liquid
02:29:38 22 flavors, did they also continue to produce the
02:29:40 23 dry flavors as well?

02:29:42 24 A. My recollection is no, they did not.

02:29:44 25 Q. Apart from the switch to liquid

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02:29:48 2 flavors, do you recall at any time more than one
02:29:50 3 variation of the RL product was produced during
02:29:52 4 your time at Park 500?

02:29:54 5 A. No, I do not.

02:29:56 6 Q. Do you know why there would be
02:29:58 7 different target levels and different acceptable
02:30:02 8 ranges for the final product solubles for
02:30:04 9 different types of RL?

02:30:06 10 A. No.

02:30:24 11 Q. In your time at Park 500, did you
02:30:30 12 ever do test runs with soluble levels that were
02:30:34 13 either higher or lower than the specification
02:30:34 14 range?

02:30:40 15 A. Solubles on the finished sheet?

02:30:42 16 Q. That's right.

02:30:42 17 A. Not that I recall, no.

02:30:44 18 Q. How about test runs with higher or
02:30:48 19 lower soluble levels at some other point in the
02:30:48 20 process?

02:30:50 21 A. No.

02:30:54 22 Q. Have you ever heard of such tests
02:30:56 23 being run?

02:31:00 24 A. I don't recall any tests of that
02:31:00 25 nature being ever run.

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02:31:04 2 Q. And you've never heard of any being
02:31:06 3 run; is that what --

02:31:06 4 A. Okay.

02:31:10 5 Q. My question was had you ever heard of
02:31:12 6 it, and you answered I don't recall. I just
02:31:16 7 wanted to clarify whether you're saying you don't
02:31:18 8 recall means you never heard of such tests being
02:31:18 9 run.

02:31:20 10 A. That's correct. I never heard of any
02:31:22 11 tests of that nature --

02:31:24 12 Q. Higher or lower soluble levels?

02:31:26 13 A. Higher or lower.

02:31:30 14 Q. Do you know who Denise Donaher is?

02:31:32 15 A. I only know the name.

02:31:34 16 Q. You've never worked with Ms. Donaher?

02:31:36 17 A. I've never met the lady, to my
02:31:38 18 knowledge.

19 (Merrill Exhibit 14 for
20 identification, May 2nd, 1990 memorandum from D.
21 Barfield, T. Bullock, T. Estes and C. Spellmeyer,
22 to distribution, on Park 500 stationery.)

02:32:28 23 Q. Mr. Merrill, the court reporter has
02:32:32 24 handed you a document labeled Merrill Exhibit
02:32:36 25 14. It's a one-page document bearing the Bates

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1 Merrill - Highly Confidential - Trade Secret
02:32:46 2 stamp PA 592805, production number 2031263050.
02:32:48 3 It's a May 2nd, 1990 memorandum from D. Barfield,
02:32:52 4 T. Bullock, ^{A/B} Estes and C. Spellmeyer, to
02:32:58 5 distribution, on Park 500 stationery. "Procedure
02:33:00 6 for finished product solubles, central line
02:33:02 7 adjustment."

02:33:04 8 MR. NUNLEY: I would note for the
02:33:06 9 record that Mr. Merrill is not on the
02:33:08 10 distribution list.

02:33:08 11 MR. KILLORY: That's right.

02:33:10 12 Q. You are not listed on the
02:33:26 13 distribution or otherwise as a recipient. Have
02:33:26 14 you had a chance to look at Merrill Exhibit 14?

02:33:28 15 A. Yes, I have.

02:33:28 16 Q. Do you recall seeing this document
02:33:28 17 before?

02:33:30 18 A. No, I have never seen this document.

02:33:32 19 Q. Do you have any understanding as to
02:33:34 20 what an FS center line shift means?

02:33:38 21 A. Yes.

02:33:40 22 Q. What does that mean?

02:33:42 23 A. FS is finished sheet and "center
02:33:46 24 line" refers to the process control chart.

02:33:50 25 Q. And by "center line" referring to the

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64:33:54 2 process control chart, specifically what part of
02:33:56 3 the process control chart does the "center line"
02:33:56 4 refer to?

02:34:00 5 A. I have limited knowledge on process
02:34:04 6 control -- statistical process control and the
02:34:06 7 definitions about center lines, upper control
02:34:10 8 limits, lower control limits. I know vaguely of
02:34:10 9 them.

02:34:18 10 Q. When below the indented section of
02:34:22 11 numbers in the middle of the page, picking up at
02:34:24 12 the next paragraph it says, "FS center line
02:34:26 13 adjustments on line 1 will be made according to
02:34:28 14 the current test procedures. FS center line
02:34:30 15 adjustments on line 2 and 3 will be made by
02:34:32 16 either adjusting the nip pressure on the size
02:34:36 17 press and/or adjusting the prep center line,
02:34:38 18 depending on the situation."

02:34:40 19 Do you know what "adjusting the nip
02:34:42 20 pressure on the size press" means?

02:34:44 21 MR. NUNLEY: I object. You can ask
02:34:48 22 him whether he has knowledge -- excuse me, can I
02:34:52 23 finish the objection? You can ask him if he has
02:34:52 24 knowledge of that independent of the document.
02:34:56 25 But it's a document that he's never seen before.

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02:34:58 2 It's dated post his time.

02:35:00 3 So I don't think it's -- I don't mind
02:35:02 4 you asking him a question, but I just want to
02:35:04 5 make sure the record is clear he's not
02:35:04 6 interpreting the document.

02:35:06 7 Q. Do you have any independent
02:35:08 8 understanding of what "adjusting nip pressure on
02:35:10 9 the size press" means?

02:35:10 10 A. Yes.

02:35:12 11 Q. What does that mean?

02:35:16 12 A. ~~It means~~ you can increase or decrease
02:35:20 13 ^{Pressure} ~~measure~~ and put more or less solubles on the
02:35:22 14 sheet.

02:35:30 15 Q. And adjusting the prep center line,
02:35:34 16 would that involve any mechanical adjustment?

02:35:38 17 A. That's the process, statistical
02:35:40 18 process control term. And again, I'm not
02:35:46 19 familiar with that.

02:35:46 20 Q. In your time at Park 500, were you
02:35:48 21 ever aware of adjustments in the nip pressure on
02:35:50 22 the size press?

02:35:50 23 A. Yes.

02:35:52 24 Q. Under what circumstances would you
02:35:52 25 make that adjustment?

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02:35:58 2 A. To control the finished sheet
02:36:00 3 solubles within specification.

02:36:04 4 Q. And would that simply be -- how
02:36:06 5 would -- explain to me how adjusting the nip
02:36:12 6 pressure would change the finished sheet soluble
02:36:14 7 level.

02:36:20 8 A. Well, you have two rolls, one hard
02:36:26 9 and one soft. And the harder you press, the
02:36:28 10 bigger the flat spot is that's in there, the
02:36:32 11 bigger the spot there is to actually apply the
02:36:34 12 size to the sheet.

02:36:38 13 So if I was running a given nip
02:36:42 14 pressure, and the lab said I was on the high side
02:36:46 15 of the spec, I might back off the nip pressure a
02:36:50 16 little bit to get down in my spec range, because
02:36:52 17 I don't want to make out of spec material.

02:36:54 18 Q. So adjusting the nip pressure would
02:37:00 19 result in either upwards or lower changing the
02:37:04 20 volume per some period of time that the solubles
02:37:08 21 came out of the tank onto the sheet?

02:37:10 22 MR. NUNLEY: Objection as to form.

02:37:16 23 Q. Is that correct? Let me ask a
02:37:18 24 different question. Is the nip pressure a volume
02:37:18 25 control?

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02:37:22 2 MR. NUNLEY: Objection as to form.

02:37:28 3 A. Volume as opposed to what?

02:37:30 4 Q. I'm just trying to understand. "Nip

02:37:32 5 pressure" is an unfamiliar term to me and I'm

02:37:34 6 just trying to understand exactly what it means.

02:37:38 7 A. Again, you have two rolls, and where
the two rolls come together is called the nip.

02:37:42 9 Q. Now, the rolls we're talking about
here --

02:37:44 11 A. The size press rolls. So I have one
roll that's very hard and one roll that's soft.
And I don't remember which one has the ram on it,
but anyway, as you increase the pressure, the
soft roll deforms more.

02:38:00 16 So it's hitting like this. As I
increase the pressure, more of the roll deforms,
and I have a larger area to put more or less
material on.

02:38:08 20 Q. What were the the circumstances that
you can recall in which you increased the nip
pressure on the size press?

02:38:22 23 A. If I was running on the low end of
the spec and had a possibility of running
material out of specification on the low side.

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b-z: 38:28 2 Q. And do you recall what the
02:38:32 3 circumstances were that caused you to be running
02:38:34 4 on the low end of the spec?

02:38:34 5 A. No.

02:38:38 6 Q. How about instances in which you
02:38:46 7 decreased the pressure on -- the nip pressure on
02:38:52 8 the size press? Do you recall the circumstances
02:38:52 9 that led you to do that when you were at Park
02:38:52 10 500?

02:38:54 11 A. I'd been running on the high side of
02:38:56 12 the spec. You try to run ^{to} in the middle.

02:39:00 13 Q. And do you recall the reasons why you
02:39:02 14 ran on the high side and it caused you to make
02:39:02 15 that adjustment?

02:39:04 16 A. No.

02:39:12 17 Q. How are the target ranges, the target
02:39:14 18 range for solubles, how is that target range set
02:39:18 19 in the specification sheet?

02:39:18 20 A. I have no idea.

02:39:20 21 Q. Do you know who sets it?

02:39:20 22 A. No, I do not.

02:39:22 23 Q. Do you know what the parameters are
02:39:26 24 that dictate what's an acceptable specification
02:39:26 25 range?

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02:39:28 2 A. No, I don't.

02:39:38 3 Q. Have you ever had any discussions on
02:39:38 4 that subject with anyone?

02:39:42 5 A. No, I haven't.

6 (Merrill Exhibit 15 for
7 identification, one-page document Bates stamped
8 PA 127947.)

02:40:16 9 Q. Mr. Merrill, the court reporter is
02:40:18 10 handing you a document that has been marked
02:40:20 11 Merrill Exhibit 15. It's Bates stamped PA
02:40:24 12 127947. It bears the production number
02:40:36 13 2025321033. Have you had a chance to look at
02:40:36 14 Merrill Exhibit 15?

02:40:40 15 A. Yes, I have.

02:40:42 16 Q. Do you know what the refractive index
02:40:44 17 is?

02:40:44 18 MR. NUNLEY: Why don't you ask the
02:40:46 19 witness if he's seen the document before first.

02:40:48 20 MR. KILLORY: I'll get to that.

02:40:50 21 Q. Do you know what a refractive index
02:40:52 22 is?

02:40:52 23 A. Yes, I do.

02:40:54 24 Q. What's a refractive index?

02:40:58 25 A. A refractive index is a measurement

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02:41:06 2 using prisms and light to measure certain --
02:41:08 3 certain materials lend themselves to measurement
02:41:10 4 by refractive index.

02:41:12 5 Q. Do you know where if anyplace in the
02:41:14 6 RL process a refractive index is used?

02:41:16 7 A. Yes.

02:41:18 8 Q. Where?

02:41:22 9 A. The evaporator feed and the
02:41:24 10 evaporator discharge.

02:41:38 11 Q. How is the refractive index used at
02:41:42 12 the evaporator feed? What is it used to
02:41:42 13 measure?

02:41:48 14 A. The refractive index is used to
02:41:50 15 measure the amount of solubles in the feed to the
02:41:52 16 evaporator.

02:41:56 17 Q. When you say "the amount," is it an
02:42:02 18 absolute figure or a percentage figure of the
02:42:02 19 solubles?

02:42:04 20 A. I don't recall exactly how it was set
02:42:06 21 up anymore.

02:42:16 22 Q. And is the refractive index on the
02:42:18 23 discharge side of the evaporator, does that
02:42:20 24 measure the same thing?

02:42:22 25 A. Yes, it measures the solubles in that

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02:42:24 2 stream.

02:42:30 3 Q. Have you ever seen the Merrill
02:42:34 4 Exhibit Number 15?

02:42:36 5 A. No.

02:42:38 6 Q. Have you ever seen a document that
02:42:40 7 looks like Exhibit Number 15?

02:42:42 8 A. No.

02:42:50 9 Q. Do you have any understanding as to
02:42:56 10 what the meaning of "New refractive
02:43:00 11 index/increased prep solubles 2 sigma" is? I'm
reading from
02:43:06 12 */looking at* the first line of 11/16/92. Do you
have an understanding of what that means?

02:43:08 13 A. I have no understanding of this
02:43:10 14 entire sheet.

02:43:24 16 Q. During your time at Park 500, were
02:43:28 17 you ever aware of transfers of liquor from one
02:43:30 18 line to another?

02:43:32 19 A. No.

02:43:36 20 Q. When you were at Park 500 there were
02:43:38 21 how many lines?

02:43:40 22 A. There were two operating lines.
02:43:42 23 Lines 1 and 2.

02:43:44 24 Q. 3 had been constructed by the time
02:43:46 25 you were --

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02:43:46 2 A. 3 was still under construction when I
02:43:48 3 left.

02:44:08 4 Q. Were there ever circumstances where
02:44:18 5 you ran low on solubles on one line such that you
02:44:22 6 would be out of specification at the time you
02:44:22 7 were at Park 500?

02:44:24 8 A. Not that I recall, no.

02:44:26 9 Q. So in your experience, there was
02:44:30 10 never a time when there was any need to -- strike
02:44:32 11 that.

02:44:40 12 MR. KILLORY: Would you mark that,
02:44:40 13 please.

14 (Merrill Exhibit 16 for
15 identification, document bearing the stamp PA
16 127981.)

02:45:06 17 Q. Mr. Merrill, the court reporter has
02:45:10 18 handed you a document, Merrill Exhibit 16,
02:45:14 19 bearing the stamp PA 127981, production number is
02:45:26 20 2025321065 to 66. Would you take a look at the
02:45:26 21 document, please.

02:45:38 22 (Witness complies.)

02:45:44 23 Q. Have you ever seen this document
02:45:46 24 before, Mr. Merrill?

02:45:46 25 A. No, I have not.

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02:45:48 2 Q. Have you ever seen any documents that
02:45:50 3 documented transfers of liquor between lines at
02:45:52 4 Park 500?

02:45:54 5 A. No, I have not.

02:45:58 6 Q. Do you know whether, since the time
02:46:00 7 you have been at Park 500, whether any liquor has
02:46:02 8 been transferred between production lines?

02:46:06 9 MR. NUNLEY: You mean since the time
02:46:06 10 he left there?

02:46:06 11 . MR. KILLORY: That's right.

02:46:08 12 A. Only in discussions with the
02:46:08 13 attorneys.

02:46:24 14 Q. Independent of your consultations
02:46:28 15 with counsel, you're not aware through
02:46:32 16 conversation or otherwise of any transfers of
02:46:34 17 liquor between lines at Park 500? .

02:46:34 18 A. That's correct.

02:46:56 19 Q. Were there ever circumstances under
02:47:02 20 which base web was run and discarded in your time
02:47:04 21 at Park 500?

02:47:12 22 A. I only remember a couple of times
02:47:18 23 where material was discarded, and it was before
02:47:24 24 we started using preservatives. No, I take that
02:47:28 25 back. It was before we used preservatives, but

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02:47:30 2 that hadn't even been put in the sheet. The
02:47:32 3 sheet had sat around and it got what we called
02:47:34 4 sour and it had to be disposed of.

02:47:42 5 Q. Were there ever times where because
02:47:48 6 of low soluble levels that you can recall base
02:47:48 7 web being run and discarded?

02:47:48 8 A. Never.

02:47:52 9 Q. Have you ever heard of that being
02:47:54 10 done since your time at Park 500?

02:47:54 11 A. No.

02:48:04 12 Q. You testified yesterday and briefly
02:48:08 13 this morning about a conversation you had with
02:48:12 14 Mr. Charles in connection with the FDA tour on
02:48:14 15 the subject of denatured alcohol and the amount
02:48:18 16 of nicotine in denatured alcohol. Do you recall
02:48:20 17 that?

02:48:20 18 A. Yes, I do.

02:48:22 19 Q. Other than that conversation with
02:48:24 20 Mr. Charles, have you ever had any conversations
02:48:28 21 on the subject of denatured alcohol that's used
02:48:32 22 in the tobacco manufacturing process?

02:48:36 23 A. Are you asking me have I had
02:48:42 24 conversations about alcohol SDA 4, or that it had
02:48:42 25 nicotine in it?

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02:48:46 2 Q. Let's start with the more general
02:48:52 3 question, the SDA 4. Have you had any
02:48:54 4 conversations about the use of SDA 4?

02:48:56 5 A. Yes, I have.

02:48:58 6 Q. And what is the substance of those
02:48:58 7 conversations?

02:49:02 8 A. To remove it from your flavor systems
02:49:04 9 because it's a volatile organic compound.

02:49:08 10 Q. What is a volatile organic compound?

02:49:12 11 A. The EPA, has part of their permitting
02:49:14 12 requirements, one of the materials that they're
02:49:16 13 concerned about is what's called a volatile
02:49:20 14 organic compound. I don't know the specific
02:49:24 15 criteria that they chose to pick them, but they
02:49:28 16 have a list of some specifics and some by type.
02:49:32 17 And of those that are listed in by type, ethyl
02:49:34 18 alcohol is one. So whatever they consider
02:49:38 19 volatile organic compounds.

02:49:42 20 But the volatile organic compounds
02:49:44 21 react with other chemicals in the lower
02:49:48 22 atmosphere and form ozone. So one of the major
02:49:50 23 criteria for air permits is volatile organic
02:49:52 24 compounds, and in our case, ethyl alcohol.

02:49:56 25 Q. So when you say "criteria for

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02:49:58 2 emission," it's to prevent volatile organic
02:49:58 3 compounds from being emitted from the
02:50:00 4 manufacturing facilities?

02:50:00 5 A. That's correct.

02:50:02 6 Q. And how do you do that?

02:50:04 7 A. One of the ways we've been working on
02:50:08 8 it is we've worked with our folks at Philip
02:50:10 9 Morris to try and remove it from the process
02:50:12 10 where we could.

02:50:18 11 Q. Literally in what fashion, how do you
02:50:18 12 do that?

02:50:24 13 A. I can't tell you that because I don't
02:50:26 14 know. That's part of the flavor formulations.
02:50:28 15 And what they're taking into account, I have no
02:50:32 16 idea. But they have worked on trying to remove
02:50:36 17 it, and have a reasonable portion of it removed.

02:50:40 18 Q. Have you had any discussions other
02:50:42 19 than the conversation with Mr. Charles as to the
02:50:46 20 nicotine content of the denatured alcohol?

02:50:56 21 A. Not that I recall, no.

02:51:04 22 Q. On the subject of emissions testing,
02:51:08 23 does Philip Morris do any testing for the
02:51:10 24 emissions of nicotine from its manufacturing
02:51:12 25 facilities?

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02:51:16 2 A. If you would just read that back one
02:51:16 3 time.

02:51:20 4 Q. Does Philip Morris do any testing for
02:51:22 5 the emissions of nicotine from its manufacturing
02:51:24 6 facilities?

02:51:26 7 A. Emissions relating to environmental
02:51:28 8 emissions?

02:51:30 9 Q. I intended it just emissions in the
02:51:34 10 sense of being emitted from the factory. Is
02:51:34 11 there --

02:51:34 12 A. No.

02:51:38 13 Q. Does Philip Morris contract for such
02:51:38 14 testing to be done?

02:51:46 15 A. ^{Let me} Be clear. Outside of what we have
02:51:50 16 already done for the emissions testing?

02:51:52 17 Q. I'm going to backtrack.

02:51:52 18 A. Yes.

02:51:56 19 Q. I asked, does Philip Morris do any
02:51:58 20 testing for the emissions of nicotine from its
02:52:00 21 manufacturing facilities. You asked whether
02:52:04 22 emissions relating to environmental emissions.
02:52:06 23 I --

02:52:08 24 A. And I've already given testimony to
02:52:12 25 the fact that we have tested the emissions from

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02:52:14 2 the factories, and one of the components of that
02:52:16 3 test is nicotine.

02:52:18 4 We also check for volatile organic
02:52:18 5 compounds and other things. So we have
02:52:24 6 established and I have told you that, yes, Philip
02:52:28 7 Morris tests for, among other things, nicotine in
02:52:30 8 the form of the environmental testing that my
02:52:32 9 group does.

02:52:34 10 So I thought you just now asked me
02:52:38 11 beyond that. And the answer is no. Not that I'm
02:52:38 12 aware of.

02:52:42 13 Q. Is the emissions testing for
02:52:46 14 environmental reasons required by state law?

02:52:48 15 MR. NUNLEY: Objection. Calls for
02:52:50 16 legal opinion, conclusion.

02:52:52 17 Q. You can answer if you know.

02:53:06 18 A. No. I don't -- is it required? I
02:53:08 19 mean, I utilize the services of my lawyers to
02:53:10 20 help me determine whether it's required or not.

02:53:12 21 Q. So you don't have any independent
02:53:14 22 knowledge as to whether it's required apart from
02:53:16 23 what your lawyers have advised you?

02:53:18 24 A. To do the testing?

02:53:20 25 Q. Whether it's required to do emissions

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02:53:22 2 testing for nicotine.

02:53:28 3 A. Independent of the lawyers, no, I
02:53:30 4 don't have an opinion.

5 (Merrill Exhibit 17 for
6 identification, interoffice correspondence from
7 G. M. Banks to distribution.)

02:54:36 8 Q. Mr. Merrill, the court reporter has
02:54:40 9 handed you a document that's been marked Merrill
02:54:46 10 Exhibit 17. It's Bates stamped PA 372780, with
02:54:52 11 the production number 2031155577, continuing
02:54:56 12 32031155579. The concluding Bates stamp is PA
02:55:06 13 37282. 782.

02:55:14 14 I will represent to you that my
02:55:16 15 understanding is that, while this document does
02:55:20 16 not show a distribution to you or authorship by
02:55:24 17 you, that it came from, among other places, your
02:55:32 18 files. Could you take a look at it.

02:55:32 19 (Witness complies.)

02:56:32 20 Q. Have you had a chance to look at
02:56:34 21 Exhibit Number 17, Mr. Merrill?

02:56:34 22 A. Yes, I have.

02:56:36 23 Q. Do you recall ever having seen it
02:56:36 24 before?

02:56:38 25 A. Not specifically, no.

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02:56:40 2 Q. Do you have any general recollection
02:56:40 3 of having seen it?

02:56:44 4 A. I'm aware of the project, yes.

02:56:46 5 Q. What was the sludge drying project at
02:56:46 6 Park 500?

02:56:54 7 A. Resource Conservation Recovery Act,
02:56:56 8 RCRA, which we talked about yesterday, it had
02:57:00 9 been -- in 1992 it was in congressional committee
02:57:02 10 and it was being worked on, and there were some
02:57:08 11 proposals that that RCRA bill had, and one of
02:57:10 12 those proposals was to reduce the pounds of
02:57:14 13 landfill material by 25 percent by I believe it
02:57:20 14 was 1995 or '6, and then 50 percent by the year
02:57:20 15 2000.

02:57:24 16 So in 1992 and in 1991 it was our
02:57:28 17 understanding that RCRA, just like the Clean Air
02:57:30 18 ^{and the} Act and/other bills, would come out of committee
02:57:32 19 and be voted on and passed. So as I also I think
02:57:36 20 mentioned yesterday or this morning, you can't
02:57:40 21 landfill anything that's more than 80 percent
02:57:40 22 water.

02:57:42 23 So typically the sludge from the
02:57:44 24 waste treatment plant is about 20 percent solid.
02:57:50 25 So you're physically landfilling -- for every 100

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1 Merrill - Highly Confidential - Trade Secret
02:57:54 2 pounds you take there, 80 pounds of it is water.
02:57:58 3 So the sludge drying process for Park
02:58:00 4 500 was to reduce the pounds. If I dried the
02:58:04 5 sludge at Park 500 and drive off the water, then
02:58:06 6 I will physically take less pounds over to the
02:58:08 7 landfill. So that's the sum and substance of
02:58:08 8 this project.

02:58:12 9 Q. The sludge we're talking about from
02:58:16 10 Park 500 is generated in what part of the RL
02:58:18 11 process at Park 500?

02:58:22 12 A. Well, where we talked earlier about
02:58:26 13 the biocides and trying to kill bugs at the waste
02:58:28 14 treatment plant, it's exactly the opposite. So
02:58:30 15 the wastewater that goes down there with the
02:58:34 16 solids and all the organic materials, these
02:58:40 17 little bugs break them down, and the bugs are
02:58:44 18 born, live, and die. So basically the sludge, if
02:58:48 19 you will, is dead bugs.

02:59:02 20 Q. Do you know what the nicotine content
02:59:04 21 of the sludge is?

02:59:06 22 A. No, I don't.

02:59:10 23 Q. Does it contain nicotine?

02:59:14 24 A. Yes, it does.

02:59:14 25 Q. In the drying process, does that

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L 02:59:16 2 create emission concerns?

02:59:20 3 MR. NUNLEY: What type of emission
02:59:20 4 concerns?

02:59:22 5 MR. KILLORY: Any emission concerns
02:59:26 6 resulting from the drying of the sludge.

02:59:30 7 A. Are you asking me that in drying the
02:59:34 8 sludge at Park 500 is there a concern with
02:59:36 9 nicotine emissions?

02:59:36 10 Q. That's right.

02:59:36 11 A. No, there's not.

02:59:40 12 Q. Any other types of emissions that are
02:59:42 13 of concern as a result of the sludge drying
02:59:42 14 process?

02:59:44 15 A. As a result of the sludge drying
02:59:46 16 process, no, not that I'm aware of.

02:59:48 17 Q. What was the result of this sludge
02:59:52 18 drying project?

02:59:56 19 A. The results of the sludge drying
03:00:00 20 process were that we had found pieces of
03:00:02 21 equipment that will dry the sludge effectively
03:00:06 22 should we need to dry the sludge before
03:00:06 23 landfilling.

03:00:18 24 Q. Does the drying process cause
03:00:22 25 emissions of any volatile organic compounds?

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03:00:30 2 A. I don't know for sure. According to
03:00:32 3 this sheet, yes, it does.

03:00:34 4 Q. But independent of this sheet, you
03:00:36 5 don't have independent knowledge of that?

03:00:38 6 A. I wouldn't remember something like
03:00:40 7 that necessarily.

8 (Merrill Exhibit 18 for
9 identification, file.)

03:01:16 10 Q. Mr. Merrill, before looking at
03:01:18 11 Exhibit 18, let me ask you another couple of
03:01:28 12 questions. In the process -- as part of
03:01:32 13 emissions control at Park 500, are any of the
03:01:36 14 emissions trapped in any trapping medium?

03:01:42 15 MR. NUNLEY: Will they then be an
03:01:42 16 emission if they're trapped?

03:01:46 17 Q. Do you understand the question?

03:01:48 18 A. I'm not sure what you're really
03:01:48 19 asking me.

03:01:50 20 Q. As a means of controlling emission,
03:01:54 21 are any substances trapped? Scrubbers or any
03:01:56 22 other type, I don't know the full range of
03:02:00 23 environmental terminology. Are they trapped by
03:02:02 24 any medium?

03:02:10 25 A. There are some small scrubbers for

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03:02:12 2 particulates in what we call the machine room
03:02:16 3 where the paper, base web, is formed, and then
03:02:18 4 the RL is created.

03:02:26 5 Q. Do you know if nicotine would be one
03:02:26 6 of the elements that's trapped with those
03:02:28 7 scrubbers?

03:02:34 8 A. I don't know that it is, no.

03:02:36 9 Q. Do you have any belief as to whether
03:02:36 10 it is?

03:02:40 11 A. Yes, I believe that the water
03:02:42 12 probably absorbs some of the nicotine that's
03:02:44 13 driven off in the dryer, yes.

03:02:48 14 Q. What happens to the material that is
03:02:50 15 trapped by those scrubbers?

03:02:58 16 A. I don't know if those scrubbers are
03:03:02 17 on a cooling tower or whether it goes straight to
03:03:06 18 the waste treatment plant. But the ultimate
03:03:08 19 disposal point for those waters is the waste
03:03:08 20 treatment plant.

03:03:10 21 Q. Take a look at what has been marked
03:03:22 22 as Merrill Exhibit 18. And take a quick look
03:03:24 23 through. I don't have many questions on this.
03:03:28 24 Just a few.

03:03:28 25 (Witness complies.)

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03:03:44 2 Q. Exhibit Number 18 is -- appears to be
03:03:46 3 a file. It's stapled as it was produced to us by
03:03:50 4 Philip Morris. The first number is PA 372484
03:03:54 5 through PA 372499. The corresponding production
03:04:04 6 numbers are 2031155265 through 2031155278-2.

03:04:20 7 And again, I will represent to you,
03:04:24 8 Mr. Merrill, that this copy of a file was
03:05:54 9 produced to us as having come from your files.
03:05:56 10 Have you had a chance to look at Merrill Exhibit
03:05:58 11 18, Mr. Merrill?

03:06:00 12 A. Yes, I have. As a point of
03:06:02 13 clarification, you mentioned these came from my
03:06:04 14 files. Are you referring to my department or my
03:06:04 15 personal files?

03:06:06 16 Q. I don't know the answer to that.

03:06:08 17 MR. KING: I believe it's the
03:06:10 18 personal file.

03:06:14 19 A. No. This to the best of my knowledge
03:06:18 20 never came out of my personal files.

03:06:22 21 Q. Do you recognize this file of
03:06:24 22 documents?

03:06:28 23 A. Parts of it.

03:06:28 24 Q. Which parts do you recognize?

03:06:32 25 A. Well, one of the reasons I don't

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03:06:36 2 believe it came from my files is that it's typed
03:06:40 3 on the folder that it was in, and it says, "Basic
03:06:44 4 modeling." When you use the software model to
03:06:50 5 predict emissions and concentrations downwind,
03:06:54 6 you have to start with a plan of the facility and
03:06:58 7 point out where the emissions are coming from so
03:07:00 8 that you can load them into the program.

03:07:02 9 So pieces and parts of this, I have a
03:07:08 10 familiarity with. And I have seen pieces and
03:07:12 11 parts that look like these, for instance, a sheet
03:07:14 12 like that.

03:07:16 13 I don't know that I've seen this
03:07:16 14 exact sheet.

03:07:18 15 Q. The sheet you're referring to --

03:07:22 16 A. Is PA 372489.

03:07:24 17 Q. The summary of average test results?
03:07:28 18 That looks familiar, you don't know if exactly
03:07:30 19 that page, but pages that look like that?

03:07:32 20 A. That look like this, that's correct.

03:07:36 21 Q. I take it from your response that the
03:07:38 22 files you maintain in your personal files do not
03:07:40 23 have typewritten labels on them, they're
03:07:42 24 handwritten?

03:07:48 25 A. To the best of my knowledge, yes.

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03:07:54 2 Q. What is the basic modeling that is
03:07:56 3 the subject of this file? Do you understand
03:07:56 4 that?

03:08:08 5 A. I didn't see anything in here -- let
03:08:10 6 me put it this way. I didn't see the final thing
03:08:12 7 in here.

03:08:16 8 Q. Nor did I, which is what led to my
03:08:18 9 question, actually, was that I didn't understand
03:08:26 10 what the model was *based on* in the documents contained in
03:08:26 11 this modeling file. Do you have any
03:08:28 12 understanding, either looking at these documents
03:08:30 13 or independent of the documents, as to what the
03:08:34 14 modeling set up that is the subject of this file
03:08:34 15 is?

03:08:54 16 A. No.

03:08:56 17 Q. Could you look at the second to last
03:09:00 18 page? It's Bates stamped PA 372498.

03:09:02 19 (Witness complies.)

03:09:04 20 Q. It's titled "Nicotine matrix."

03:09:10 21 A. Mm-hmm.

03:09:12 22 Q. On the left side it has stack, size
03:09:16 23 prep, Yankee, tunnel, rotary, total. Across the
03:09:20 24 top, L-1, L-2, L-3, which I take to be lines 1, 2
03:09:24 25 and 3, and then a total line with some

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03:09:26 2 footnotes. Have you ever seen a document like
03:09:26 3 this before?

03:09:36 4 A. I don't have a specific memory of
03:09:38 5 seeing one like this.

03:09:42 6 Q. Do you know what is represented on
03:09:44 7 this page?

03:09:44 8 A. Yes.

03:09:46 9 Q. What is it?

03:09:54 10 A. What you need to do is establish your
03:09:58 11 emissions and plug those numbers into your
03:10:00 12 program.

10:04 13 Q. Do you know whether the numbers
03:10:06 14 reflected here are actual measurements or
03:10:08 15 projections using a model?

03:10:10 16 A. No, I don't.

03:10:14 17 Q. What is the purpose of the program
03:10:18 18 into which the numbers are plugged?

03:10:32 19 A. The -- in some regulations the
03:10:38 20 regulatory bodies want to see a dispersion model
03:10:42 21 of the pollutant. So this would have been a
03:10:48 22 dispersion model of whatever pollutant one was
03:10:50 23 looking for.

03:10:52 24 Q. In this case, nicotine, the nicotine
10:56 25 matrix, would that -- for this page?

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03:10:56 2 A. That wouldn't necessarily mean that
03:10:58 3 that's what was looked for in this.
03:11:02 4 Q. That wouldn't mean ~~that~~ that was one
03:11:02 5 of the items that was looked for?
03:11:04 6 A. Not necessarily. Sometimes it's easy
03:11:08 7 to just go get all the stuff, and since I have
03:11:12 8 already told you that we do the stack emissions
03:11:16 9 testings and have ~~it~~ at Park 500, it's just as
03:11:18 10 easy to get these off of the sheets.
03:11:22 11 Q. Are there different stacks at the
03:11:24 12 size prep, Yankee, tunnel, and rotary stages of
03:11:26 13 the Park 500 process?
03:11:30 14 MR. NUNLEY: Objection as to form.
03:11:34 15 A. I don't know about all of the ones
03:11:40 16 you described. The Yankee has a separate one.
03:11:44 17 And the tunnel is separate from the Yankee but I
03:11:46 18 don't know -- remember if it's one or more.
03:11:48 19 Q. The question is prompted by, on this
03:11:52 20 nicotine matrix there are separate listings under
03:11:56 21 "Stack" for size prep, Yankee, tunnel and
03:12:00 22 rotary. Does that refresh your recollection as
03:12:02 23 to whether there are separate stacks at each of
03:12:02 24 those stages?
03:12:06 25 A. I don't know what they're referring

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03:12:10 2 to by "size prep." I guess it's the room in
03:12:16 3 there. I don't remember where that one goes.
03:12:16 4 Yankee, tunnel and rotary, yes.

03:12:20 5 Q. The footnote on page PA 372498, the
03:12:26 6 fourth footnote, it reads -- could you take a
03:12:26 7 look at that, please?

03:12:28 8 (Witness complies.)

03:12:38 9 A. Okay.

03:12:38 10 Q. Do you understand what that refers
03:12:38 11 to?

03:12:46 12 MR. NUNLEY: I have *the same* several
03:12:50 13 objections -- same objections as I've posed
03:12:54 14 earlier to a document the witness hadn't seen.
03:12:58 15 He can testify as to what he understands language
03:13:00 16 like this to mean. But he cannot testify as to
03:13:02 17 what he understands this document to mean. He
03:13:04 18 didn't draft it.

03:13:04 19 MR. KILLORY: That's my question.

03:13:06 20 Q. What do you understand this to mean
03:13:08 21 based on your knowledge of the Park 500 facility
03:13:10 22 and emissions testing?

03:13:16 23 A. Well, there are exhaust hoods over
03:13:20 24 the makeup and run tanks in the size prep room.
03:13:24 25 So what this says to me is that somebody checked

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03:13:28 2 the velocity of the air moving in those systems,
03:13:30 3 and found that line 2 size prep had a higher
03:13:36 4 exhaust air flow rate than line 3.

03:13:40 5 And that's -- it says, line 2 size
03:13:42 6 prep number higher than line 3, maybe due to
03:13:46 7 higher exhaust air flow rate, six times greater,
03:13:48 8 turning over the room air and drawing in dusty
03:13:48 9 air from the machine room.

03:13:52 10 So whichever number is referred to
03:13:56 11 here as 4, and I can't -- I'm not sure I can
03:13:56 12 tell.

r 13:58 13 Q. I'm sorry. I think we're literally
03:14:02 14 working from different pages. I'm looking at
03:14:04 15 372498.

03:14:14 16 A. Oh, I'm sorry. Oh. Sorry.

03:14:20 17 Q. The fourth footnote on that page
03:14:24 18 regarding the line 3 tunnel number being lower
03:14:28 19 than others due to lower pH of RLTC size prep
03:14:34 20 solution. Could you take a look at that
03:14:36 21 footnote.

03:14:36 22 (Witness complies.)

03:14:50 23 A. Okay.

03:14:52 24 Q. Again, based on your knowledge of
03:14:58 25 Park 500 as well as your emissions expertise, do

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03:15:00 2 you know what that is referring to?
03:15:02 3 A. No.
03:15:08 4 Q. Do you know why the lower percentage
03:15:10 5 of blend for January of burley stem and burley
03:15:14 6 class material would have any impact on the
03:15:16 7 nicotine matrix figures?
03:15:20 8 A. Do I have any reason?
03:15:22 9 Q. Do you have any understanding?
03:15:24 10 Independent of just looking at the document.
03:15:24 11 A. No.
12 (Merrill Exhibit 19 for
13 identification, letter from Mr. Nunley to Mr.
14 Payton, with attachments.)
03:16:20 15 Q. Mr. Merrill, the court reporter has
03:16:26 16 handed you Merrill Exhibit Number 19, the first
03:16:28 17 page of which is a letter from Mr. Nunley to John
03:16:32 18 Payton of my firm. Attached to it are a series
03:16:38 19 of pages. It did not come stapled or attached.
03:16:46 20 They were represented as having come, as in the
03:16:46 21 letter, from your files.
03:16:46 22 They do not bear a PA stamp. When I
03:16:48 23 received them I was on my way to the deposition
03:16:48 24 and we didn't have time to process them. But I
0 16:52 25 will read the production numbers, which are

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03:17:02 2 2031470000 through 0009.

03:17:04 3 MR. NUNLEY: Mr. Killory, can I ask
03:17:06 4 the reason that my letter to Mr. Payton will be
03:17:08 5 included as part of the exhibit?

03:17:10 6 MR. KILLORY: My primary reason is to
03:17:12 7 keep these together so I know when I have these
03:17:14 8 processed what documents these are when this
03:17:16 9 exhibit comes back.

03:17:16 10 MR. NUNLEY: They will be Bates
03:17:18 11 numbered, won't they?

03:17:20 12 MR. KILLORY: The problem is we don't
03:17:22 13 have Bates numbers, and these have not been
03:17:24 14 recorded in our system because of when I received
03:17:26 15 them. So I want to keep them together as one
03:17:30 16 unit and know which documents they are so they
03:17:32 17 don't get confused with others.

03:17:36 18 Q. Mr. Merrill, could you take a look at
03:17:40 19 these documents.

03:17:40 20 (Witness complies.)

03:18:56 21 A. Okay.

03:19:02 22 Q. Before I turn to the exhibit,
03:19:04 23 Mr. Merrill, just so the record is clear, do you
03:19:08 24 have an understanding as to why Philip Morris
03:19:12 25 does testing of nicotine emissions?

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03:19:18 2 A. Yes.

03:19:20 3 Q. And what is that?

03:19:24 4 A. Because it's one of the things that
03:19:26 5 comes out in the air, and when you're spending a
03:19:28 6 lot of money analyzing it it's very easy to add
03:19:32 7 things on. So Philip Morris has nicotine as one
03:19:34 8 of its things it deals with.

03:19:36 9 It's very easy to add that test on
03:19:40 10 and collect the data rather than try -- if for
03:19:42 11 some reason in the future it was required, it
03:19:44 12 would be much more costly to go get it.

03:19:46 13 Q. Is there any other reason you're
03:19:48 14 aware of?

03:19:48 15 A. No.

03:19:58 16 Q. Could you turn to Exhibit Number 18,
03:20:02 17 the first chart, production number ending in
03:20:06 18 0000.

03:20:06 19 (Witness complies.)

03:20:08 20 Q. I took a look at these documents last
03:20:14 21 night, and I just wanted to see if you can help
03:20:18 22 me understand them. Can you explain to me the
03:20:24 23 chart, "Nicotine summary of air releases"?

03:20:26 24 Q. Below it there's a chart for
03:20:28 25 different facilities. Let's take Park 500, for

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03:20:32 2 example. It say "Facility Park 500 1992

03:20:38 3 production. 126,700,000 pounds packed out."

03:20:40 4 What does that mean?

03:20:50 5 A. The only thing I know "pounds packed

03:20:56 6 out" means, means that 126,700,000 pounds were

03:20:58 7 packed in boxes or hogsheads and shipped from the

03:21:00 8 facilities.

03:21:02 9 Q. Pounds of finished RL product?

03:21:06 10 A. That's correct.

03:21:08 11 Q. Have you seen this -- well, you've

03:21:08 12 looked at all the documents. Have you seen these

03:21:08 13 documents before?

03:21:12 14 A. The only one that I didn't remember,

03:21:14 15 having two sheets for the BL plant is the only

03:21:16 16 thing I see as an anomaly here.

03:21:20 17 Q. The second category, nicotine tons

03:21:26 18 per year, again, just continue for the Park 500

03:21:32 19 facility. 8.590. What does that represent?

03:21:40 20 A. That represents the tons of nicotine

03:21:46 21 in the air that was discharged.

03:21:50 22 Q. 8.59 tons of nicotine were discharged

03:21:56 23 in the air in 1992 from that facility?

03:21:58 24 A. According to this sheet, yes.

03:22:00 25 Q. Just so I understand. I'm not asking

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U3:22:02 2 you to verify the accuracy of the numbers. I'm
03:22:04 3 just trying to understand what the chart purports
03:22:04 4 to show.

03:22:06 5 Did you prepare this chart?

03:22:08 6 A. No, I did not.

03:22:14 7 Q. How is that figure obtained? From
03:22:16 8 actual nicotine measurements?

03:22:22 9 A. I had this chart put together by
03:22:28 10 Mr. Paul Pitts, and I do not know what portion of
03:22:32 11 this is based on actual emission testing numbers
03:22:38 12 and how much of it is based on similarity. In
03:22:44 13 other words, if I had two similar processes and I
03:22:46 14 had a number for one but not the other, then I
03:22:48 15 might have used the number for the one for both.

03:23:16 16 Q. The double asterisk footnote that is
03:23:18 17 beside the BL figure, it says, "Plant emissions
03:23:22 18 were calculated by applying the ratio of 1993
03:23:26 19 throughputs and estimated emissions to the 1992
03:23:30 20 throughput."

03:23:32 21 Do you know what that means?

03:23:52 22 MR. NUNLEY: Ted, you really don't
03:23:52 23 understand that?

03:23:54 24 MR. KILLORY: I want to make sure I
03:24:00 25 understand what it says. I do not, no. I had a

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03:24:02 2 very limited opportunity to look at these
03:24:02 3 documents. But I don't understand.

03:24:08 4 A. Well, I don't know specifically what
03:24:10 5 that refers to.

03:24:14 6 Q. That makes two of us. Do you have
03:24:16 7 any idea?

03:24:18 8 A. Yes, I do.

03:24:18 9 Q. What's your idea?

03:24:24 10 A. My idea is that we probably didn't
03:24:30 11 test the emissions until 1993 at the BL plant,
03:24:32 12 and as I said a minute ago, if we have a similar
03:24:36 13 process, a similar rate, whatever, we may use an
03:24:40 14 actual number and make the assumption that it was
03:24:42 15 the same in the other time period.

03:24:46 16 So my suspicion is that that note
03:24:48 17 refers to the fact that he had perhaps real
03:24:52 18 numbers for the BL plant in '93 and for '94, but
03:24:58 19 not '92, and he presumed they might be the same.

03:24:58 20 Q. Throughput in that sense is the
03:25:02 21 finished product that's represented in the second
03:25:08 22 column of the chart under "Production"? Does
03:25:08 23 that mean throughput?

03:25:12 24 A. It would be that the throughput would
03:25:14 25 be the pounds of production.

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L
03:25:18 2 Q. And the emissions factor in the final
03:25:24 3 column for the 1992 numbers, pounds per 1,000
03:25:28 4 pound production, how is that number derived?
03:25:32 5 Take the Park 500 figure, for example, .1356.

03:25:34 6 A. We don't have to take a specific one.

03:25:36 7 Q. Okay.

03:25:38 8 A. One of the things when you do the air
03:25:40 9 testing is you must know what the process is
03:25:44 10 doing at that point in time. Again, I think we
03:25:46 11 talked about this yesterday. For running 1,000
03:25:48 12 pounds an hour today, and I do the test, and I
' 25:52 13 get a value for some VOC, for example, and later
03:25:58 14 on they're running a 1,500 pounds an hour, what's
03:25:58 15 the emission?

03:26:02 16 So what we do is we collect the
03:26:04 17 data. We also collect what the plant's doing,
03:26:08 18 and create an emission factor, an emissions per
03:26:12 19 1,000 pounds of production so that we can do some
03:26:14 20 calculations for permit applications.

03:26:16 21 Q. Let me make sure I understand. Is
03:26:20 22 the factor calculated based on the actual testing
03:26:24 23 results or is -- or are the actual -- I'm sorry,
03:26:30 24 the estimated figures resulting from the
03:26:34 25 emissions factor?

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03:26:44 2 A. Okay. If -- now let's be specific.
03:26:44 3 Let's go to the BL plant.
03:26:46 4 Q. Okay.
03:26:48 5 A. We have an emission factor of 3.1383
03:26:56 6 and you can see he used that 3.1 -- 1383 for '92,
03:26:58 7 and that's what the double asterisk is.
03:26:58 8 Q. Right.
03:27:02 9 A. So we create an emissions factor on
03:27:08 10 what we've done, and in this case, 1993, would
03:27:14 11 use the actual stack test, but we use that factor
03:27:22 12 now to estimate 1992, based on the production.
03:27:26 13 Q. For BL I gather the anomalous
03:27:28 14 situation of the exact same emissions factor,
03:27:30 15 because the numbers were projected back from
03:27:32 16 '93.
03:27:32 17 A. 3.
03:27:38 18 Q. But my only question was whether --
03:27:40 19 taking the Park 500 -- not having done the
03:27:44 20 calculations, but taking the Park 500 number,
03:27:50 21 whether you have the emissions factor, apply that
03:27:50 22 to the production poundage and come up with an
03:27:52 23 estimate of the tons per year, or whether you
03:27:54 24 have the production number, you have actuals for
03:27:58 25 the nicotine tons per year, and then you derive

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03:28:02 2 from that the emissions factor. Do you know?
03:28:04 3 A. Say that one more time.
03:28:08 4 Q. Okay. The first column of numbers is
03:28:12 5 the poundage per year, and take Park 500,
03:28:16 6 126,700,000. You then have nicotine tons per
03:28:20 7 year, 8.59. Then you have the emissions factor
03:28:22 8 of .1356.

03:28:26 9 And my question is whether you know
03:28:32 10 whether the emissions factor is derived from the
03:28:36 11 calculation involving the actual poundage and an
03:28:42 12 actual measurement of the nicotine tons per year,
03:28:44 13 and from that you derive an emissions factor, or
03:28:50 14 do you take the poundage, the 126 million and
03:28:52 15 change figure, and multiply that by a
03:28:54 16 predetermined emissions factor that you have,
03:28:56 17 whether from modeling or otherwise, and come up
03:29:00 18 with a nicotine poundage -- nicotine tons per
03:29:00 19 year figure.

03:29:02 20 MR. NUNLEY: Objection as to form.
03:29:08 21 A. It's the latter, which is we run a
03:29:12 22 test, get a factor, take the total production,
03:29:14 23 and multiply the total production by the factor.
03:29:18 24 Q. Okay. So the nicotine tons per year
03:29:20 25 is a calculated figure that's based on the

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03:29:24 2 poundage times the emissions factor that's been
03:29:26 3 calculated based on a test?

03:29:28 4 A. That's based on a stack test, that's
03:29:28 5 correct.

03:29:32 6 Q. How frequently are those stack tests
03:29:32 7 done?

03:29:38 8 A. It varies from location to location.

03:29:40 9 Q. Varies between what and what? In
03:29:42 10 terms of time period.

03:29:44 11 A. MR. NUNLEY: Objection as to form.

03:30:08 12 A. Once you establish an emission, if
r 30:12 13 the process doesn't change, then there's not a
03:30:16 14 lot of need to go back and get another number.
03:30:18 15 If a process changes or if it's large enough you
03:30:24 16 may go back and check some of the numbers from
03:30:26 17 time to time. There's no set time period that
03:30:28 18 all these places are checked.

03:30:48 19 Q. Footnote 5 says that -- in part says,
03:30:50 20 "Modeling performed on NC and Stockton Street
03:30:52 21 indicated no violations of the ambient nicotine
03:30:54 22 standard in Virginia."

03:30:56 23 Do you know what the ambient nicotine
03:31:02 24 standard in Virginia is? What does that refer
03:31:02 25 to?

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03:31:04 2 A. Virginia used to have its own
03:31:10 3 hazardous air pollutant list and it now follows
03:31:16 4 the EPA hazardous air pollutant list. And
03:31:16 5 nicotine is not on that.

03:31:22 6 Q. When it says "Serious violations have
03:31:24 7 been modeled around the BL plant," what does that
03:31:24 8 mean?

03:31:32 9 A. What that means is that the amount of
03:31:36 10 nicotine discharged in the air around the BL
03:31:42 11 plant ~~where we~~ ^{we are} required to do something, we
03:31:46 12 would be exceeding the state's hazardous air
03:31:48 13 pollutant number at the time.

03:31:56 14 Q. And how about the last line, "Ambient
03:32:00 15 attainment status at Park 500 unknown at this
03:32:02 16 time since no modeling has been performed." Do
03:32:08 17 you know why no modeling had been performed at
03:32:08 18 Park 500?

03:32:10 19 A. Specifically, no.

03:32:10 20 Q. Generally?

03:32:12 21 A. I would be speculating.

03:32:18 22 Q. Do you know if modeling has since
03:32:20 23 been performed at Park 500?

03:32:36 24 A. No, I do not.

03:32:52 25 Q. Is nicotine a permit parameter for

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I 1 Merrill - Highly Confidential - Trade Secret
L 03:32:54 2 any Philip Morris facility?

03:33:02 3 A. Not that I'm aware of, no.

03:33:04 4 Q. It's not for Park 500?

03:33:04 5 A. No.

03:33:26 6 MR. NUNLEY: Are you referring,
03:33:28 7 Mr. Killory, when you say "nicotine permit
03:33:30 8 parameter," you mean for air emissions?

03:33:34 9 Q. Are there any other permits that
03:33:34 10 you're aware of for which nicotine would be
03:33:38 11 required as a permit parameter?

03:33:40 12 A. Not that I'm aware of, no.

03:33:46 13 Q. Would you take a look at the second
03:33:50 14 page, the production number ending in 1, 0001.
03:33:52 15 (Witness complies.)

03:34:02 16 Q. The question is similar to the one I
03:34:04 17 had as to the numbers on the first page. When
03:34:08 18 you've got pounds per hour, pounds per year, and
03:34:10 19 a factor, and under "Nicotine" you've got the
03:34:18 20 factor, pounds per hour, tons per year, do you
03:34:22 21 know how the numbers in this chart are derived?

03:34:24 22 MR. NUNLEY: Objection as to form.

03:34:32 23 A. Some of these numbers may be actual
03:34:36 24 tests and some of these numbers, as I've said
03:34:38 25 earlier, may be rolled over from similar tests at

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03:34:40 2 another facility.

03:34:46 3 Q. And how about the nicotine figures,
03:34:50 4 are they a product of multiplying the factor by
03:34:54 5 the actual pounds per year?

03:35:02 6 A. The pounds per hour would be times
03:35:06 7 the pounds per hour and the tons per year would
03:35:06 8 be times the pounds per year.

03:35:10 9 Q. Again, to be clear, my question is
03:35:12 10 the same one as I essentially asked as to the
03:35:18 11 first page. Do you derive the estimated actuals
03:35:24 12 by applying the factor and not the vice versa?
03:35:26 13 Do you understand -- let's leave it at that.

03:35:34 14 Do you derive the factor from the
03:35:36 15 actuals or do you derive the actuals by using the
03:35:38 16 factor?

03:35:42 17 MR. NUNLEY: Objection as to form.

03:35:44 18 A. You lost me. I'm sorry.

03:35:46 19 Q. Do you know how you calculate -- in
03:35:48 20 the pounds per hour, do you know if that reflects
03:35:50 21 an actual measurement or a calculated measurement
03:35:52 22 of nicotine based on the factor?

03:36:02 23 A. The factor is multiplied by the
03:36:06 24 pounds per hour or the pounds per year.

03:36:08 25 Q. In the --

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1:36:10 2 A. To give you the nicotine. That's
03:36:12 3 pounds of material going through, for instance,
03:36:18 4 RL RCB steam cylinder, that's 19,400 pounds per
03:36:24 5 hour of RL RCB or 42,122,000 pounds per year.
03:36:30 6 The factor is point 0000007, so if someone were
03:36:34 7 to change the amount of RL RCB at the MC to 50
03:36:38 8 million pounds, then the tons per year number
03:36:40 9 would go up.

03:36:52 10 Q. In each of these charts, there is a
03:37:02 11 factor column that precedes some numbers. And
03:37:06 12 does what you just said as to the calculation of
03:37:08 13 the nicotine, pounds per hour and tons per year
03:37:12 14 as derived from the factor, as multiplied by the
03:37:14 15 first two columns, does that same explanation
03:37:18 16 apply to the derivation of the nicotine figures
03:37:20 17 in the other charts?

03:37:22 18 MR. NUNLEY: Objection. Compound.

03:37:26 19 Q. Are they derived figures using the
03:37:28 20 factor?

03:37:30 21 A. Are which derived figures?

03:37:32 22 Q. The nicotine numbers in each of these
03:37:36 23 charts. Nicotine per hour, nicotine tons per
03:37:38 24 year.

03:37:40 25 A. Those are derived numbers.

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L
03:37:42 2 Q. And that's true of all of the charts
03:37:44 3 in this collection of documents?

03:37:44 4 A. That's correct.

03:37:48 5 Q. And the factor for each of these
03:37:52 6 charts is as you testified before, is a factor
03:37:56 7 that's derived from -- put it in your words. How
03:37:58 8 is that derived?

03:38:02 9 A. From stack test emissions.

03:38:02 10 Q. And --

03:38:04 11 A. Stack emission tests.

03:38:06 12 Q. And you could not recall how often
38:10 13 those stack tests are done for the respective
03:38:14 14 facilities; is that correct?

03:38:20 15 A. That's correct. Can we take a short
03:38:20 16 break?

03:38:22 17 Q. Sure.

03:38:24 18 THE VIDEO OPERATOR: We're going off
03:38:26 19 the record. The time on the screen is 3:38:27.

03:38:28 20 (A recess was taken.)

03:50:30 21 THE VIDEO OPERATOR: We're back on
03:50:34 22 the record. The time on the screen is 3:50:32.

03:50:34 23 Q. Mr. Merrill, one question I'm not
03:50:38 24 sure whether I asked you. The materials
50:44 25 regarding the emissions, is there a -- does

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.51:00 2 Philip Morris make any effort to reuse materials
03:51:02 3 that are trapped in the emissions control
03:51:04 4 process?

03:51:08 5 A. Not that I'm aware of, no.

6 (Merrill Exhibit 20 for
7 identification, State of North Carolina
8 Department of Natural Resources and Community
9 Development, dated with a receipt stamp of August
10 7, 1987.)

03:51:56 11 Q. Mr. Merrill, the court reporter is
03:52:04 12 handing you Merrill Exhibit Number 20. It is not
03:52:08 13 Bates stamped or production stamped. It is
03:52:12 14 headed State of North Carolina Department of
03:52:14 15 Natural Resources and Community Development,
03:52:20 16 dated with a receipt stamp of August 7, 1987.
03:52:28 17 You can see the August date underneath the
03:52:28 18 letter.

03:52:32 19 The question I have for you is really
03:52:36 20 focused on the last page, which has a chart. But
03:52:40 21 if you could take a look at Exhibit 20 briefly.

03:52:40 22 (Witness complies.)

03:55:14 23 THE VIDEO OPERATOR: This is the end
03:55:18 24 of videotape number 5. The time on the screen is
03:55:22 25 3:55:20.

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03:55:24 2 (Discussion off the record.)

03:56:04 3 THE VIDEO OPERATOR: This is

03:56:08 4 videotape number 6, the continuation of the

03:56:10 5 deposition of Mr. Merrill. Today is June 30th,

03:56:16 6 1995. The time on the screen is 3:56:15. You're

03:56:18 7 on the record.

03:56:30 8 MR. NUNLEY: Mr. Killory, while the

03:56:32 9 witness is looking at that, I notice this doesn't

03:56:34 10 have a Philip Morris production number on it nor

03:56:36 11 a standard PA number.

03:56:38 12 MR. KILLORY: Right. That's what I

03:56:38 13 noted for the record.

03:56:40 14 MR. NUNLEY: What is -- can you tell

03:56:42 15 me what this is? Do you know where it came

03:56:46 16 from? I'm not sure I can tell if the last three

03:56:50 17 pages are part of the first three.

03:56:52 18 MR. KILLORY: My understanding is

03:56:54 19 that it all is one document. It's a public

03:57:00 20 document on file in North Carolina, that's my

03:57:02 21 understanding.

03:57:20 22 MR. NUNLEY: Are you saying you

03:57:22 23 represent that it is on file in this form?

03:57:22 24 MR. KILLORY: That's my

03:57:24 25 understanding. That's right.

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03:57:40 2 Q. Have you had a chance to look at
03:57:40 3 Merrill Exhibit Number 20?

03:57:42 4 A. Yes, I have.

03:57:44 5 Q. Do you recognize Merrill Exhibit
03:57:44 6 Number 20?

03:57:46 7 A. No, I do not.

03:57:48 8 Q. Have you ever seen it before?

03:57:48 9 A. No, I have not.

03:57:54 10 Q. On its face it appears to be an air
03:57:58 11 permit granted to Philip Morris, as it says, for
03:58:00 12 the construction, operation of air pollution
03:58:02 13 abatement facilities and emission sources.

03:58:06 14 Attached to it are a number of pages describing
03:58:10 15 the permitted facility.

03:58:20 16 On the last page is a diagram. Do
03:58:22 17 you see that diagram?

03:58:22 18 A. Mm-hmm.

03:58:24 19 Q. Do you understand what that diagram
03:58:26 20 represents?

03:58:28 21 A. I have absolutely no earthly idea
03:58:30 22 what that represents.

03:58:32 23 Q. It says "Tobacco stems in and tobacco
03:58:38 24 stems out of a removal vessel." Do you know of
03:58:38 25 any process used by Philip Morris in which

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03:58:42 2 tobacco stems are put into a removal vessel and
03:58:46 3 then taken out of that removal vessel?

03:58:46 4 A. Yes.

03:58:46 5 Q. What process is that?

03:58:48 6 A. The one we referred to as the ART
03:58:48 7 process.

03:58:52 8 Q. That was the ART process that we were
03:58:52 9 discussing yesterday?

03:58:52 10 A. That's correct.

03:58:54 11 Q. Do you have any understanding as to
03:58:56 12 whether this diagram is of the ART process?

r 59:00 13 A. It would be speculation on my part.
03:59:02 14 But if I had to speculate --

03:59:04 15 MR. NUNLEY: You don't have any
03:59:04 16 obligation to speculate.

03:59:06 17 A. No, I really don't know what it is.
03:59:08 18 I've never seen it.

03:59:14 19 Q. Do you know whether the ART process
03:59:22 20 was ever conducted at Philip Morris's -- at any
03:59:26 21 facility of Philip Morris other than Bermuda
03:59:26 22 Hundred?

03:59:26 23 A. No.

03:59:30 24 Q. Does Philip Morris have a facility in
03:59:32 25 Cabarrus County, North Carolina?

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03:59:34 2 A. Yes, they do.

03:59:38 3 Q. Do you know whether the ART process
03:59:40 4 or any variation of the ART process was conducted
03:59:42 5 at that facility?

03:59:42 6 A. No, I do not.

03:59:54 7 Q. What is -- what manufacturing process
03:59:56 8 is conducted at the Cabarrus Philip Morris
03:59:56 9 facility?

04:00:00 10 A. It's a cigarette manufacturing
04:00:02 11 plant.

04:00:06 12 Q. Is that a primary?

' 00:10 13 A. You have a primary and a making and
04:00:12 14 packing department in the facility.

04:00:16 15 Q. There's no BL or RL process conducted
04:00:18 16 at that facility; is that correct?

04:00:18 17 A. That's correct.

04:00:24 18 Q. As part of the ART disposal process,
04:00:26 19 are you aware of any ART stems -- the ART stem
04:00:30 20 disposal process, are you aware of any ART stems
04:00:32 21 that originated in Cabarrus County?

04:00:36 22 A. No, I am not.

04:00:44 23 Q. Mr. Merrill, do you believe that most
04:00:48 24 people believe that the cigarette manufacturing
04:00:50 25 process involves just chopping up tobacco for

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04:00:50 2 cigarettes?

04:00:54 3 A. Yes.

04:00:58 4 Q. Have you ever expressed that view
04:01:00 5 publicly?

04:01:02 6 A. Probably.

04:01:04 7 Q. Do you remember on what occasions?

04:01:06 8 A. Not specifically, no.

04:01:08 9 Q. Do you remember speaking with a
04:01:14 10 reporter for the Richmond Times Dispatch and
04:01:16 11 expressing that view?

04:01:18 12 A. I remember the reporter from the
04:01:22 13 Richmond Times Dispatch. I do not recall
04:01:26 14 specifically mentioning that to him.

15 (Merrill Exhibit 21 for
16 identification, Richmond Times Dispatch article
17 entitled "Tracking tobacco, Philip Morris tour
18 reveals company's efforts to get most from every
19 leaf.")

04:02:08 20 Q. Mr. Merrill, the reporter has handed
04:02:10 21 you an exhibit that's been marked as Merrill
04:02:12 22 Exhibit Number 21. It's a copy of the August 21,
04:02:16 23 1994 Richmond Times Dispatch article written by
04:02:20 24 Chip Jones, a staff writer. It's entitled,
04:02:28 25 "Tracking tobacco, Philip Morris tour reveals

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MANHATTAN REPORTING CORP.

1 Merrill - Highly Confidential - Trade Secret
04:02:30 2 company's efforts to get most from every leaf."

04:02:30 3 Would you take a look at that
04:02:30 4 article, please.

04:02:32 5 (Witness complies.)

04:04:38 6 Q. Have you had a chance to review the
04:04:40 7 article, Mr. Merrill?

04:04:40 8 A. Yes, I have.

04:04:42 9 Q. On the second page of Exhibit 21,
04:04:48 10 right near the end of the article, my copy is
04:04:50 11 sort of cropped at the end, but it's four
04:04:52 12 paragraphs up from the end, it says, it's in
04:04:58 13 quotes, "Probably 99 percent of the world thinks
04:05:00 14 that you just chop up tobacco for cigarettes,"
04:05:04 15 Merrill said. 'There's a lot more to it than
04:05:06 16 that.'"

04:05:08 17 Do you recall saying that to this
04:05:08 18 reporter?

04:05:10 19 MR. NUNLEY: Mr. Killory, I'm going
04:05:14 20 to object to any questions about this article or
04:05:18 21 comments or quotes from Mr. Merrill in the
04:05:22 22 article on the basis that the article is dated
04:05:24 23 August 21, '94.

04:05:26 24 I would assume Mr. Jones wrote the
0 05:28 25 article shortly after this conversation was

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1 Merrill - Highly Confidential - Trade Secret
b-1
04:05:32 2 held. Your client in the case, ABC, has taken
04:05:36 3 the position that comments made after the lawsuit
04:05:40 4 was filed are not relevant and are not subject to
04:05:42 5 discovery, and specifically has resisted
04:05:46 6 discovery as to the Golden Baton Award based on
04:05:48 7 that reason.

04:05:50 8 Therefore I think it's improper for
04:05:54 9 you to ask questions on this article. And if you
04:05:56 10 do so I think what that does is gives us every
04:06:00 11 right to obtain information related to the Golden
04:06:04 12 Baton. And certainly if you ask about this, our
04:06:06 13 intention would be to move immediately to obtain
04:06:08 14 that information.

04:06:10 15 MR. KILLORY: I disagree with your --
04:06:16 16 under what provision of Court order are
04:06:20 17 Mr. Merrill's public statements off limits from
04:06:22 18 discovery?

04:06:24 19 MR. NUNLEY: Well, they're off limits
04:06:26 20 from discovery from the standpoint of relevance.
04:06:28 21 But what I'm telling you is your client has taken
04:06:32 22 the position that comments related to the program
04:06:36 23 that postdate the lawsuit are not discoverable,
04:06:40 24 and as I understand it, have refused discovery on
04:06:42 25 the Golden Baton on that very basis.

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1 Merrill - Highly Confidential - Trade Secret

04:06:44 2 What I'm telling you is if you
04:06:48 3 proceed to ask questions here, I'll take that as
04:06:52 4 a retraction of your position on Golden Baton.
04:06:54 5 And you're shaking your head; perhaps you can
04:06:56 6 tell me what the difference is between the two.

04:06:56 7 MR. KILLORY: I'm saying that my
04:06:58 8 questions on this article have nothing to do with
04:07:00 9 Golden Baton whatsoever.

04:07:02 10 MR. NUNLEY: No, but they concern
04:07:06 11 comments made after your libelous show was
04:07:10 12 broadcast with malice and certainly after the
04:07:14 13 lawsuit was filed.

04:07:14 14 MR. KILLORY: If you just want to sit
04:07:16 15 here and make speeches, you can make speeches.
04:07:16 16 But the point is there's nothing improper about
04:07:18 17 the question I posed to the witness.

04:07:18 18 MR. NUNLEY: Why isn't there
04:07:20 19 something improper? You know there's a discovery
04:07:22 20 cutoff in the case, don't you?

04:07:24 21 MR. KILLORY: The discovery cutoff as
04:07:26 22 to document production does not preclude me from
04:07:26 23 asking Mr. Merrill about statements that he's
04:07:28 24 made that are relevant to this case.

04:07:30 25 MR. NUNLEY: You understand that one

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1 Merrill - Highly Confidential - Trade Secret
04:07:32 2 of the reasons for the document cutoff was
04:07:36 3 irrelevance based on date; is that correct?

04:07:36 4 MR. KILLORY: Do you understand that
04:07:38 5 burden is always part of a discovery ruling on
04:07:40 6 documents, and it doesn't apply to the questions
04:07:44 7 that can be asked in discovery in a deposition?

04:07:46 8 Moreover, to the extent that even if
04:07:48 9 you are correct, the relevance as to
04:07:52 10 manufacturing processes post whatever cutoff date
04:07:56 11 is reflected in the document restriction does not
04:08:00 12 apply to a statement that is not -- that would be
r 08:02 13 one thing, if what we were talking about was a
04:08:04 14 post cutoff document, cutoff date manufacturing
04:08:06 15 process. This is not such a statement.

04:08:08 16 MR. NUNLEY: How would you
04:08:10 17 characterize the comments made by your client
04:08:14 18 about the show -- all I'm telling you is, if you
04:08:16 19 ask him questions about this article, it seems to
04:08:20 20 me it's absolutely indistinguishable from the
04:08:22 21 position you've taken with respect to comments
04:08:28 22 made by your client post broadcast, post lawsuit,
04:08:28 23 about the show.

04:08:30 24 MR. KILLORY: I disagree with that.

0 08:30 25 MR. NUNLEY: Well, fine. I'm putting

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1 Merrill - Highly Confidential - Trade Secret
04:08:34 2 you on notice, and if you proceed, we'll get it
04:08:36 3 typed up and move immediately before the judge to
04:08:36 4 get those documents.

04:08:38 5 MR. KILLORY: You can -- I don't care
04:08:40 6 about your threats about typing up. But let me
04:08:44 7 take a five-minute break and come back.

04:08:46 8 THE VIDEO OPERATOR: We're going off
04:08:50 9 the record. The time on the screen is 4:08:50.

04:08:52 10 (A recess was taken.)

04:20:26 11 THE VIDEO OPERATOR: Back on the
04:20:30 12 record. The time on the screen is 4:20:29.

04:20:32 13 MR. KILLORY: I want to state for the
04:20:34 14 record that based on conversations with
04:20:36 15 co-counsel during the break, my understanding of
04:20:40 16 the situation with the Golden Baton Awards is
04:20:42 17 that the judge specifically ruled that inquiry as
04:20:46 18 to the state of mind of the ABC personnel was
04:20:48 19 irrelevant as to the issue in the case, which was
04:20:52 20 the state of mind of those personnel at the time
04:20:54 21 the show was put on the air, prepared and put on
04:20:58 22 the air, which is an entirely different issue
04:21:00 23 from Mr. Merrill's, Philip Morris's understanding
04:21:10 24 as to what ^{most} ~~those~~ people believe as to what the
04:21:14 25 cigarette process involves.

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MANHATTAN REPORTING CORP.

1 Merrill - Highly Confidential - Trade Secret

04:21:20 2 Having said that, I'm choosing not to
04:21:22 3 pursue any questions on the article. The exhibit
04:21:22 4 stands as it is.

04:21:28 5 Q. Mr. Merrill, did you conduct -- have
04:21:30 6 you ever seen a ^{reel} -- strike that.

04:21:34 7 Philip Morris produced to ABC in
04:21:38 8 discovery a tape labeled "How A Cigarette Is
04:21:44 9 Made," narrated by you, a videotape, labeled
04:21:48 10 "Trade secret." Do you recall when you made a
04:21:50 11 presentation on how a video is made, in what
04:21:54 12 context -- how a cigarette is made, excuse me.

0 21:58 13 A. You're asking me do I remember when
04:22:00 14 that video was made?

04:22:04 15 Q. First let me ask -- let me strike
16 that.

04:22:06 17 Have you seen the video narrated by
04:22:08 18 you, "How A Cigarette Is Made," that was produced
04:22:10 19 to ABC by Philip Morris in this case?

04:22:12 20 A. Yes, I have.

04:22:18 21 Q. Do you know whether -- if there are,
04:22:22 22 for the portion of the video, from start to
04:22:26 23 finish, whether there are any edits, deletions,
04:22:30 24 omissions in the text of your narration?

0 22:32 25 A. In the text?

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MANHATTAN REPORTING CORP.

1 Merrill - Highly Confidential - Trade Secret

04:22:36 2 Q. That's right.

04:22:38 3 A. Not that I'm aware of, no.

04:22:46 4 Q. By your focus on text, what did you
04:22:46 5 mean by that?

04:22:52 6 A. We edited -- we edited dead time out,
04:22:54 7 moving from the flip chart back to the lectern
04:22:56 8 and such.

04:22:58 9 Q. I'm sorry, I interrupted. Did you
04:23:00 10 finish your answer?

04:23:00 11 A. Mm-hmm.
Several

04:23:04 12 Q. So certain points in the video -- was
04:23:06 13 there one camera that filmed the video?

04:23:08 14 A. Yes.

04:23:12 15 Q. At several points in the video there
04:23:14 16 are jump cuts or edits. Your understanding is
04:23:18 17 that none of your words were omitted in those
04:23:20 18 edits; is that correct?

04:23:20 19 A. That's correct.

04:23:28 20 Q. To what audience were you speaking
04:23:30 21 when you made that video?

04:23:36 22 A. It was the three local television
04:23:44 23 stations, 6, 8 and 12. And as I recall, a
04:23:46 24 reporter from Washington representing the
04:23:50 25 Louisville newspaper.

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MANHATTAN REPORTING CORP.

1 Merrill - Highly Confidential - Trade Secret

2 04:23:58 Q. Given that audience, I take it

3 04:24:00 there's nothing in the video that Philip Morris
4 04:24:02 considers to be a trade secret?

5 04:24:12 A. I really don't know.

6 04:24:14 Q. You don't have any understanding as
7 04:24:16 to whether there were trade secrets in that video
8 04:24:18 presentation, in that presentation to the
9 04:24:20 reporters?

10 04:24:26 A. My understanding is no, but...

11 04:24:30 Q. What was -- was the presentation on
12 04:24:32 how a cigarette is made given in conjunction with
13 04:24:36 a tour of Philip Morris facilities?

14 04:24:38 A. That's correct.

15 04:24:52 Q. What facilities did you tour?

16 04:24:56 A. I toured the blended leaf plant, the
17 04:25:00 reconstituted leaf plant, the manufacturing
18 04:25:06 center, primary processing, and the making and
19 04:25:06 packing department.

20 04:25:10 Q. Were there any other videotapes or
21 04:25:12 audio recordings made of that tour?

22 04:25:14 A. None.

23 04:25:20 Q. In the course of your presentation on
24 04:25:22 how a cigarette is made, did the reporters
0 25:24 present ask any questions?

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MANHATTAN REPORTING CORP.

1 Merrill - Highly Confidential - Trade Secret

04:25:26 2 A. Yes, they did.

04:25:28 3 Q. Were those questions deleted from the
04:25:32 4 copy of the videotape that you've seen that was
04:25:32 5 produced to ABC?

04:25:34 6 A. Yes, they were.

04:25:36 7 Q. Were your answers to those questions
04:25:38 8 also deleted?

04:25:40 9 A. Yes, they were.

04:25:46 10 Q. The video picks up in the middle of a
04:25:48 11 sentence in describing tobacco. Do you recall
04:25:50 12 from having reviewed the tape whether there was
04:25:52 13 discussion, whether there was a presentation
04:25:54 14 before where the video picks up?

04:25:58 15 A. As I recall, the gal that was
04:26:06 16 videotaping just didn't start quite when I did.

04:26:08 17 Q. So to the best of your recollection
04:26:10 18 *Sentences* only a few ~~seconds~~ would have been cropped from
04:26:12 19 the video of your presentation?

04:26:14 20 A. To the best of my knowledge, yes.

04:26:16 21 Q. At the beginning?

04:26:16 22 A. At the beginning.

04:26:18 23 Q. Do you know approximately how many
04:26:20 24 questions were asked by reporters in the course
04:26:22 25 of that video?

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MANHATTAN REPORTING CORP.

1 Merrill - Highly Confidential - Trade Secret

04:26:24 2 A. No, I do not.

04:26:28 3 Q. Was it taped by the TV reporters?

04:26:30 4 Did they have cameras there?

04:26:34 5 A. Channel 6 had a camera. Channel 12
04:26:38 6 had a camera. How much video they shot, I have
04:26:38 7 no idea.

04:26:46 8 Q. Did you do any special preparation to
04:26:48 9 educate yourself for that presentation to the
04:26:48 10 reporters?

04:26:50 11 A. Yes, I did.

04:26:50 12 Q. And what was that?

04:26:56 13 A. The areas that I had no working
04:27:00 14 knowledge in, I had discussions with people in
04:27:04 15 those areas so that I could make that
04:27:06 16 presentation.

04:27:08 17 MR. NUNLEY: Just so the waiver is
04:27:12 18 voluntary, I'll just let Mr. Killory know that
04:27:14 19 this presentation too occurred well after the
04:27:20 20 broadcast and well after the lawsuit. You've
04:27:22 21 chosen to go into it. Our position on this is
04:27:26 22 absolutely the same as this article. I think
04:27:30 23 you've waived your position on Golden Baton.

04:27:30 24 MR. KILLORY: I clearly disagree with
04:27:34 25 that. I think you're completely wrong. But

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1 Merrill - Highly Confidential - Trade Secret
04:27:36 2 we've stated our respective positions.

04:27:38 3 Q. When was the presentation made that
04:27:42 4 was the subject of the video produced to ABC by
04:27:42 5 Philip Morris?

04:27:44 6 A. I don't remember the exact date.

04:28:14 7 Q. Is RL, the RL process, one of the
04:28:18 8 areas that you specially prepared for for the
04:28:20 9 tour and video in?

04:28:20 10 A. No.

04:28:22 11 Q. How about the BL process?

04:28:28 12 A. No.

04:28:34 13 Q. What were the areas in which you
04:28:40 14 specially prepared that you did not have working
04:28:42 15 knowledge of?

04:28:58 16 A. Oriental blending. I would have to
04:29:02 17 go through the tape. Some of the leaf material I
04:29:04 18 didn't -- I had to go get some information on the
04:29:24 19 leaf department activities. And also changes
04:29:32 20 were made. They actually were doing expanded
04:29:36 21 tobacco different than when -- over what I was
04:29:36 22 aware they were doing.

04:29:40 23 So there were some changes made based
04:29:44 24 on new information by going through the factory.

04:29:48 25 Q. Do you recall meeting with anyone at

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MANHATTAN REPORTING CORP.

1 Merrill - Highly Confidential - Trade Secret

04:29:50 2 Philip Morris in preparation for doing the
04:29:54 3 presentation recorded on the video produced to
04:29:54 4 ABC?

04:29:56 5 A. Yes.

04:29:56 6 Q. Who did you meet with?

04:30:00 7 A. I met with Brad Scott.

04:30:02 8 Q. Who is Brad Scott?

04:30:06 9 A. I don't know his full title. He's a
04:30:08 10 director, and he works in the leaf department.

04:30:10 11 Q. In the --

04:30:10 12 A. Leaf department.

0 30:10 13 Q. Who else?

04:30:38 14 A. Dr. Jerry Whidby. Lewis Watts. And
04:30:40 15 Hunter Smith.

04:30:44 16 Q. Did you previously testify that
04:30:48 17 Dr. Whidby is in the R&D department?

04:30:48 18 A. That's correct.

04:30:52 19 Q. How about Lewis Watts?

04:30:58 20 A. Lewis Watts is in QS&S.

04:31:00 21 Q. And what is QS&S?

04:31:06 22 A. Quality and specifications systems.

04:31:10 23 Q. Sounds like Q&SS.

04:31:12 24 A. Q&SS, that's correct.

0 31:16 25 Q. And what is Hunter Smith's position?

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1 Merrill - Highly Confidential - Trade Secret

04:31:20 2 A. Hunter Smith works in the Oriental
04:31:22 3 blending process.

04:31:30 4 Q. Approximately how long did the tour
04:31:32 5 of which the videotape was a part take?

04:31:40 6 A. Approximately six hours.

04:31:40 7 Q. Did anyone else from Philip Morris
04:31:42 8 accompany you on the tour?

04:31:46 9 A. Yes, they did.

04:31:48 10 Q. Who was that?

04:32:06 11 A. Victor Han. Jay Poole, P-o-o-l-e.
04:32:10 12 And Judy Jones.

04:32:12 13 Q. Who is Jay Poole?

04:32:18 14 A. Jay Poole is director of community
04:32:20 15 relations and government affairs.

04:32:30 16 Q. How about Judy Jones?

04:32:32 17 A. Judy works for Jay. I'm not sure
04:32:34 18 what Judy's official title is.

04:32:38 19 Q. Did any of those individuals speak
04:32:40 20 with the reporters on the tour?

04:32:40 21 A. Yes.

04:32:44 22 Q. All of them?

04:32:44 23 A. Yes.

04:32:50 24 Q. When I say "speak with," did they
04:32:52 25 have ^{substantive} /_{subsequent} discussions as part of the

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MANHATTAN REPORTING CORP.

1 Merrill - Highly Confidential - Trade Secret
04:32:54 2 overall presentation?

04:33:02 3 A. As I recall -- I mean, I don't know
04:33:04 4 what you mean by "substantive." If you're
04:33:10 5 talking about discussing how the operations work,
04:33:10 6 the answer is no.

04:33:18 7 Q. What was the subject matter on which
04:33:22 8 Mr. Han spoke to the reporters?

04:33:28 9 A. They did an interview of him outside,
04:33:32 10 on camera. And that's all I remember on that.
04:33:32 11 They went outside.

04:34:34 12 Q. The basis for your discussions of the
04:34:46 13 RL process in the video that was produced to ABC
04:34:54 14 is the same basis for your testimony here today;
04:34:56 15 is that correct? And by that I mean -- let me
04:34:58 16 clarify.

04:35:00 17 Your experience -- you've previously
04:35:02 18 testified that your testimony with regard to RL
04:35:06 19 process here today is based on your six years of
04:35:08 20 experience at the RL facility and your general
04:35:10 21 familiarity with the process since that time. Is
04:35:10 22 that correct?

04:35:14 23 A. That's correct.

04:35:18 24 Q. Is that also the basis -- was that
04:35:22 25 also the basis for your presentation with regard

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1 Merrill - Highly Confidential - Trade Secret
04:35:28 2 to RL as part of the video, "How A Cigarette Is
04:35:28 3 Made," that was produced to ABC?

04:35:30 4 A. That's correct.

04:35:42 5 MR. KILLORY: I don't have any more
04:35:44 6 questions at this time.

04:35:46 7 THE VIDEO OPERATOR: We're going off
04:35:48 8 the record. This ends the deposition. The time
04:35:52 9 on the screen is 4:35:53.

04:37:26 10 (Time noted: 4:35 p.m.)

11
12 David Ernest Merrill

13 DAVID ERNEST MERRILL

14
15 Subscribed and sworn to before me
16 this 16 day of January, 1996, 1995.

17
18 Linda C. Thornton
19 Richmond, VT
20 Commission Expires 2/28/97

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2 C E R T I F I C A T E

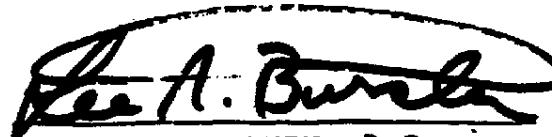
3
4
5
6 I, LEE A. BURSTEN, a Registered
7 Professional Reporter and Notary Public within
8 and for the Commonwealth of Virginia, do hereby
9 certify:

10 That DAVID ERNEST MERRILL, the
11 witness whose continued deposition is
12 hereinbefore set forth (pages 193 through 389)
13 was previously duly sworn, and that such
14 continued deposition is a true record of the
15 testimony of said witness.

16 I further certify that I am not
17 related to any of the parties to this action by
18 blood or marriage, and that I am in no way
19 interested in the outcome of this matter.

20 IN WITNESS WHEREOF, I have hereunto
21 set my hand this Sta day of Sept, 1995.

22
23
24
25



Lee A. BURSTEN, R.P.R.

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2 E X H I B I T S

3 DESCRIPTION	PAGE	LINE
4 (Merrill Exhibit 11 for identification, 5 research and development chemical 6 analysis section service request and 7 data sheet.).....	238	15
8 (Merrill Exhibit 12 for identification, 9 memorandum from J. Pickelhaupt to 10 distribution, subject, line 1 blending 11 chemicals, dated June 18, 1983.).....	290	18
12 (Merrill Exhibit 13 for identification, 13 memorandum dated August 7th, 1989, from 14 C. U. Spellmeyer to distribution.).....	315	9
15 (Merrill Exhibit 14 for identification, 16 May 2nd, 1990 memorandum from D. 17 Barfield, T. Bullock, T. Estes and C. 18 Spellmeyer, to distribution, on Park 19 500 stationery.).....	319	18
20 (Merrill Exhibit 15 for identification, 21 one-page document Bates stamped PA 22 127947.).....	326	5
23 (Merrill Exhibit 16 for identification, 24 document bearing the stamp PA 127981.)...	329	13
25		

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2 E X H I B I T S

	DESCRIPTION	PAGE	LINE
4	(Merrill Exhibit 17 for identification,		
5	interoffice correspondence from G. M.		
6	Banks to distribution.)..... 336 4		
7	(Merrill Exhibit 18 for identification,		
8	file.)..... 340 7		
9	(Merrill Exhibit 19 for identification,		
10	letter from Mr. Nunley to Mr. Payton,		
11	with attachments.)..... 349 11		
12	(Merrill Exhibit 20 for identification,		
13	State of North Carolina Department of		
14	Natural Resources and Community		
15	Development, dated with a receipt stamp		
16	of August 7, 1987.)..... 364 5		
17	(Merrill Exhibit 21 for identification,		
18	Richmond Times Dispatch article		
19	entitled "Tracking tobacco, Philip		
20	Morris tour reveals company's efforts		
21	to get most from every leaf.")..... 369 14		
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